No. 89-1156

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 10(h)(1) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 910(h)(1), adjusts benefits payable for "total permanent disability or death which commenced or occurred prior to October 27, 1972," and Section 10(h)(2), 33 U.S.C. 910(h)(2), provides for a particular source of payments of those adjusted benefits. The question presented is whether Section 10(h)(1) and (2) applies to a claim for death benefits based on a death that occurred after October 27, 1972, due in part to an injury that resulted in total permanent disability before that date.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A53) is reported at 885 F.2d 983. The decision of the Benefits Review Board (Pet. App. B1-B11) and the decision of the administrative law judge (Pet. App. C1-C36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1989, and the petition for a writ of certiorari was filed on December 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are an employer subject to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and its insurer. Pet. App. C4. The Act provides compensation to covered workers or their survivors for work-related injuries that result in disability or death. See 33 U.S.C. 908, 909 (1982 & Supp. V 1987).

Before 1972, the Act fixed the weekly disability benefits due a permanently and totally disabled worker at 66⅔% of his or her average weekly wage, subject to a maximum benefit rate of $70 per week. 33 U.S.C. 906(b), 908(a) (1970); Pet. App. A11. The statute also fixed the weekly death benefits due the surviving spouse and child of an injured worker at 50% of the worker's average weekly wage, subject to a $52.50 per week maximum. 33 U.S.C. 909(b) and (e) (1970); Pet. App. A11. Because the law allowed no cost of living adjustment (COLA), inflation eroded the value of these weekly payments.

In a law enacted on October 27, 1972, Congress amended the Act to increase the maximum benefits for permanently and totally disabled workers from $70 per week to an amount tied to the "national average weekly wage," a figure the Secretary of Labor determines each year. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(a), 86 Stat. 1252-1253 (codified at 33 U.S.C. 906(b) and (d)). See Pet. App. A12. Congress also increased death benefits from 50% to 66⅔% of a worker's "average weekly wage" for a spouse with a child and provided that this wage should not be considered to be less than the "applicable national average weekly wage" (except that the total weekly benefits could not exceed the deceased

worker's actual weekly earnings). Pub. L. No. 92-576, §§ 10(b) and (d), 20(c)(2), 86 Stat. 1257, 1258, 1265 (codified at 33 U.S.C. 909(b), (c) and (e)) (1982 & Supp. V 1987)). See Pet. App. A13.[1] To ensure that awards kept pace with inflation, Congress provided an automatic COLA[2] for both permanent total disability and death benefits. Pub. L. No. 92-576, § 11, 86 Stat. 1258 (codified at 33 U.S.C. 910(f) (1982 & Supp. V 1987)). See Pet. App. A14.

Congress applied these more generous benefit and COLA provisions to pre-1972 disabilities and deaths by enacting Section 10(h) of the statute, 33 U.S.C. 910(h). See Pub. L. No. 92-576, § 11, 86 Stat. 1258-1259; Pet. App. A14-A15. In Section 10(h)(1), it adjusted the benefits "to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972 [the date of enactment of the 1972 amendments]," by giving such claimants an initial adjustment equal to the difference between the amount to which they "would be entitled if the disabling injury or death had occurred on the day following such enactment date" and the amount to which they were entitled before then. 33 U.S.C. 910(h)(1)(A) and (B). This one-time adjustment was required "[n]ot later than ninety days after the date of enactment." 33 U.S.C. 910(h)(1).

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[1] In 1972 Congress also made death benefits available to survivors of a totally disabled worker who died from causes other than the work-related injury that gave rise to the disability. Pub. L. No. 92-576, § 5(d), 86 Stat. 1253-1254. Congress repealed this provision in 1984. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 9, 98 Stat. 1647.

[2] We employ the "cost of living" terminology because it was employed by the court of appeals. The increase in fact represents an annual increase in a certain national wage rate.

In Section 10(h)(3), Congress provided that the COLA, which by its own terms applied only to injuries sustained after the 1972 amendments were enacted (see 33 U.S.C. 910(f)), would also apply to pre-1972 injuries "which resulted in permanent total disability or death." Congress did so by considering such injuries "to have occurred on the day following such [enactment] date." 33 U.S.C. 910(h)(3). Although in general, benefits under the Act are payable by the employer (or his insurer), Section 10(h)(2), 33 U.S.C. 910(h)(2), provides that the COLA for pre-1972 injuries (under Section 10(h)(3)) and the adjustment for pre-1972 disabilities and deaths (under Section 10(h)(1)) are to be paid in equal shares out of federal appropriations and a Special Fund.[3]

2. In 1971, Edwin Lebel, an employee of petitioner Bath Iron Works, suffered a totally disabling work-related injury. Pet. App. A3, C7. His average weekly wage at the time of injury was $173.58 (Pet. App. C19), but the pre-1972 law allowed him to receive payments of only $70 a week rather than $115.60 (66⅔% of his average weekly wage). Pursuant to the 1972 amendments, he received both a Section 10(h)(1) adjustment and a COLA under Section 10(h)(3). *Lebel* v. *Bath Iron Works Corp.*, 3 Ben. Rev. Bd. Serv. (MB) 216 (Ben. Rev. Bd.), aff'd on other grounds, 544 F.2d 1112 (1st Cir. 1976). Government appropriations and the Special Fund

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[3] The Special Fund is a Treasury account that employers finance and the Department of Labor administers. 33 U.S.C. 944 (1982 & Supp. V 1987). Among other responsibilities, the Fund pays benefits in certain instances where a previously injured employee sustains a second injury or an employer or insurer is insolvent. 33 U.S.C. 944(i) (1982 & Supp. V 1987).

each paid 50% of these adjustments. 3 Ben. Rev. Bd. Serv. (MB) at 219.

Edwin Lebel died in January 1983; his surviving spouse, Velma Lebel, subsequently applied for death benefits on behalf of herself and Mr. Lebel's stepson. Pet. App. A6, C5, C15. An administrative law judge determined that Mr. Lebel's injury had contributed to his death and that death benefits were due to his survivors under Section 9 of the statute as it existed in 1983. Pet. App. C1-C36.[4] Pet. App. C10-C13. Since that Section applies in cases of death occurring after enactment of the 1972 amendments, Mrs. Lebel and the stepson received the larger, post-1972 benefits rather than the smaller amounts available under the pre-1972 law. Pet. App. C18-C19.[5] Without specifying the amounts, the ALJ also determined that the Special Fund had to pay both the adjustments due under Section 10(h)(3) (annual COLAs) and Section 10(h)(1) (assumedly, the difference in pre- and post-1972 death benefits).[6] Pet. App. C20-C29, C35.

The Benefits Review Board modified the ALJ's award to require the Special Fund and government

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[4] The ALJ's decision, undated in petitioners' appendix, was issued on November 5, 1985.

[5] As discussed above, the 1972 amendments provided for compensation equal to 66⅔% of the deceased worker's average weekly wage, provided that this wage was not less than the applicable 1983 national average wage except that the maximum benefit could not exceed the worker's actual average weekly wage. Applying this formula, the ALJ awarded weekly benefits of $173.58, the amount of Lebel's average weekly wage. Pet. App. C18-C19.

[6] As explained above, the Special Fund would in fact pay only 50% of payments ordered under Section 10(h); government appropriations would pay the remaining 50%.

appropriations to pay in equal shares all but $36.75 of the $173.58 per week that the ALJ had awarded.[7] Pet. App. B1-B9. The Board reached this result by applying Section 10(h)(1)(A)-(B), under which government appropriations and the Special Fund pay the difference between the benefits to which a survivor "would be entitled" if an injured worker had died on the day following enactment of the 1972 amendments and the benefits to which the survivor "was entitled" on the enactment date. The Board did not explain why application of this Section was necessary for a survivor who had been entitled to no benefits until Mr. Læbel's death in January 1983 and whose benefits at that time were determined under another Section of the Act (Section 9).

3. On the Director's petition for review, the court of appeals vacated the Board's decision and remanded for further proceedings. Pet. App. A1-A47. It determined that the Board had erred in applying the provisions of Section 10(h)(1) to the weekly death benefits and in holding that the government and the Fund, rather than the employer (or its insurer) were obligated to pay $136.83 of those benefits. After thorough analysis of the 1972 amendments (Pet. App. A9-A19), the court concluded that Section 10(h)(1) did not apply because that Section adjusts compensation "due to total permanent disability or death which commenced or occurred prior to October 27, 1972," and thus clearly excludes Mrs. Læbel's claim for a death that occurred in 1983 (Pet. App. A21-A24).

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[7] The Board also affirmed the ALJ's determination that the Special Fund (and the government) had to pay the Section 10(f) annual COLAs, pursuant to Section 10(h)(3). Pet. App. B9. The Director did not dispute this determination. Pet. App. A8-A9, B9 n.2.

As the court explained, "[t]he death of a worker who died after 1972 did not *'occur'* before 1972. And we do not see how such a death can be said to have 'commenced' before 1972." Pet. App. A23. The court observed that this interpretation of the statute made "perfectly good sense" because the main purpose of Section 10(h)(1) was to increase benefits of claimants who had become entitled to benefits when the pre-1972 rates applied. Pet. App. A24. Since the survivors of a worker disabled before 1972 automatically receive the higher death benefit rates under Section 9 when the worker dies after 1972, the court concluded that no Section 10(h)(1) adjustment was necessary and that the provisions for payment of any such adjustment did not apply. Pet. App. A24-A25.

Rejecting petitioners' reliance on legislative history, the court concluded that the relevant materials "[a]ll * * * suggest that Congress intended [Section 10(h)(1)] only to adjust disability benefits for pre-1972 injuries, and to adjust death benefits for pre-1972 deaths." Pet. App. A28-A31. Moreover, the court stated, industry representatives had not complained about premium calculation problems for post-1972 deaths based on pre-1972 injuries. Pet. App. A32-A33. And the court observed that Congress's action was consistent with its practice of requiring insurers to pay increased or modified death benefits in pre-amendment injury, post-amendment death cases, when it amended the statute in 1948, 1956, 1961, and 1984. Pet. App. A33-A36.

The court also rejected petitioners' argument that Section 10(h)(1) should apply to this pre-1972 injury, post-1972 *death* case because the Section applies to pre-1972 injury, post-1972 *total permanent disability* cases. The court concluded that the Section

covered pre-1972 injuries that resulted in post-1972 total permanent disability for two reasons. First, while the amended Section 9 provides for increased death benefits in pre-1972 injury, post-1972 death cases, there is no such provision for giving increased disability benefits in pre-1972 injury, post-1972 permanent disability cases. Therefore, Section 10(h)(1) provides the only method for most of these workers to receive the more generous 1972 benefit rates. Pet. App. A39-A43. Second, the statutory language distinguishes between the two types of cases. The first sentence of Section 10(h)(1) covers "total permanent disability or death which commenced" prior to enactment of the 1972 amendments, and "[i]t is more natural to think of a post-1972 total disability arising out of a pre-1972 injury as having 'commenced' before 1972 than it is to think of a post-1972 death as having 'commenced' before 1972." Pet. A44. Moreover, as the court recognized, the second sentence in Section 10(h)(1), which describes how to calculate the adjustment, suggests an intent to include pre-1972 injuries that resulted in post-1972 disability because that sentence uses the phrase "disabling *injury* or death" (emphasis added) rather than "total permanent disability or death." Pet. App. A44. The court found no comparable evidence, or ambiguity, in the use of the word "death" in Section 10(h)(1).

Finally, the court acknowledged that in *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283 (1988), the Sixth Circuit had adopted a contrary construction of Section 10(h)(1). Pet. App. A46. But the court agreed with the *Detroit Harbor* dissent that the language and purpose of the statute do not permit petitioners' construction. *Ibid.*

ARGUMENT

The court of appeals' decision is the correct reading of the statute. While the court's decision conflicts with that of the Sixth Circuit in *Detroit Harbor*, there are few if any remaining cases likely to be governed by the erroneous Sixth Circuit decision.[8] In addition, in any case subject to review in the Sixth Circuit, the Director will ask that court to reconsider its holding in light of the persuasive decision of the First Circuit.

1. The court below correctly recognized that the terms of Section 10(h)(1) and (2) do not authorize payment out of government appropriations and the Special Fund of any adjustment for post-1972 death claims, regardless of the date of injury or of permanent disability. The first sentence of Section 10(h)(1) limits adjustments to "total permanent disability or death which commenced or occurred prior to October 27, 1972." It is implausible at best that Congress would have used such language to apply to a death in 1983 on the ground that it "commenced or occurred" more than ten years earlier. See *Detroit Harbor*, 850 F.2d at 294 (Nelson, J., dissenting) ("I should be very surprised indeed if it ever crossed the draftman's mind that anyone might think the quoted words could cover a lingering death that 'commenced' prior to October 27, 1972, and finally came to a merciful end more than eight years later.").[9]

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[8] We are in fact aware of only one case in which the issue is pending before the Benefits Review Board; that case arises in the First Circuit and will be controlled by the court of appeals' decision here. See *Director, OWCP (Cain)* v. *Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1988) (dismissing petition for review for lack of a final order).

[9] Indeed, in those same 1972 amendments, and until 1984, Congress also made death benefits available to survivors of a

The second sentence of Section 10(h)(1) reinforces the Section's inapplicability to post-1972 death claims. That sentence defines the *amount* of the Section's adjustment in a manner that can apply only to pre-1972 deaths. Thus, the adjustment requires determining the compensation to which a survivor "would be entitled if the * * * death had occurred on the day following October 27, 1972" and subtracting "the compensation to which such employee or survivor was entitled on October 27, 1972." 33 U.S.C. 910(h)(1)(A)-(B). This computation makes sense for survivors of employees who died before October 27, 1972, because they would have been receiving the lower, pre-1972 benefit rates, and the computation would raise their rates under the 1972 amendments. The computation makes no sense in cases of employees who die after 1972 because their survivors, like Mrs. Lebel, are already entitled to the higher benefit rate under Section 9. Pet. App. C18-C19. It is irrelevant what rate would have applied if the death had occurred on "the day following" October 27, 1972, just as it is meaningless to inquire as to the compensation to which a survivor was entitled before that date; a "survivor" in every such case "was entitled" to *no* benefits at that time because no death had yet occurred.[10]

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totally disabled worker who died from causes unrelated to his disabling injury. See note 1, *supra*.

[10] Indeed, the Board recognizes the inapplicability of this adjustment formula to post-1972 death cases; the Board does not use the formula in computing the amount of the adjustment. In this case, the Board noted that petitioner Bath Iron Works had not challenged the entitlement of Mrs. Lebel and her son to $173.58 per week—the amount calculated by the ALJ according to the actual-date-of-death formula in Section

The court below also correctly read the legislative history of Section 10(h)(1). A provision like Section 10(h)(1) was first suggested during the hearings in order to increase benefits for permanently and totally disabled employees and widows "on the rolls as of [the] effective date [of the proposed amendments]". See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 172 (1972) (Ralph Hartman) (*Senate Hearings*). The House and Senate reported bills with language that became Section 10(h) (118 Cong. Rec. 30,672, 32,023, 36,376 (1972)), and the reports explained that the adjustment applied only to deaths occurring before 1972.[11] Sponsors or supporters of the bills similarly explained that Section 10(h) applied to "injured workers or the survivors

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9 of the Act. Pet. App. B7. The Board did not explain why it was appropriate under its theory to use this figure rather than the amount his survivors would have received if Mr. Lebel had died on the day after enactment of the 1972 amendments as indicated under Section 10(h). See also *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 294 (6th Cir. 1988) (Nelson, J., dissenting) ("[N]one of these death benefits and funeral expenses can be attributed to an 'adjustment' required by § 10(h)(1) * * *. What [the survivor] actually received, of course, was a § 9 award, not an adjustment under § 10.").

[11] See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 3 (1972) (Section 10 will increase benefits for "those people who have been receiving compensation"), *id.* at 18 (Fund pays adjustments for deaths "occurring prior to the date of enactment"); S. Rep. No. 1125, 92d Cong., 2d Sess. 6 (1972) (Section 10 increased benefits for "those people who have been receiving compensation"), *id.* at 22 (increase for "employees or survivors already receiving payments under the Act").

who have been receiving compensation" (118 Cong. Rec. 36,271 (1972) (Sen. Williams)), to "injured workers or survivors, presently receiving payments" (*id.* at 36,381 (Rep. Daniels)), and to persons "who have been declared permanently disabled, or are widows or survivors of such persons, prior to enactment of this bill" (*id.* at 36,386 (Rep. Steiger)). Nowhere is there any indication that Congress intended petitioners' counterintuitive result of giving an adjustment to survivors of employees who died after 1972, since benefits payable to those survivors under Section 9 already reflect the more generous rates.[12]

Finally, the interpretation adopted by the court of appeals "makes perfectly good sense" (Pet. App. A24) because the main purpose of Section 10(h)(1) was to increase benefits of those claimants who had become entitled to benefits before the post-1972 rates applied. Pet. App. A24. As Senator Williams, the cosponsor of the Senate bill, explained, Section 10(h) was "a very unique provision to assist those injured workers or the survivors who have been receiving compensation or benefits for total disability or death." 118 Cong. Rec. 36,271 (1972). And Congress obligated the Special Fund and federal appropriations to pay for the adjustments because "many of the workers or survivors receiving these benefits were in the employ of companies no longer in business" (*ibid.*), not because of any great concern about the premium calculation problem of insurers. Indeed,

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[12] Petitioners mistakenly rely on certain testimony by Edward D. Vickery. Pet. 22 (quoting *Senate Hearings* 343). As the court of appeals noted (Pet. App. A32-A33), Vickery's testimony, as well as references by Secretary of Labor Hodgson (*Senate Hearings* 32), addressed the *COLA provision* as applied to post-1972 injuries and not the *Section 10(h)(1) adjustment provision.*

Congress's consistent practice of requiring insurers to pay for increased or modified death benefits under the 1948, 1956, 1961, and 1984 Longshore amendments makes it most unlikely that Congress intended, without explanation, to relieve insurers of this burden in 1972. See Pet. App. A33-A36 and cases cited.[13]

2. Petitioners appear to recognize that their position cannot be squared with the text of Section 10 (h) (1) (Pet. 25-27), but argue that the statute cannot mean what it says because it must treat post-1972 death and post-1972 total permanent disability cases equally. But as the court of appeals explained, post-1972 total permanent disabilities differ in two respects from post-1972 deaths. First, the statutory language of Section 10(h)(1) is itself sufficiently flexible to encompass post-1972 disabilities caused by pre-1972 injuries: it is more natural to think of a disability as having "commenced" in a pre-amendment injury than to think of a death in those terms,[14] and Section 10(h)(1) also variously refers to the "disability or death" *or* "disabling injury or death" that occurred before 1972. Second, Section 10(h)(1) is the *only* section that can be read to grant post-1972 benefit amounts to those with pre-1972 injuries and post-1972 total permanent disabilities. Thus, failure to read Section 10(h)(1) in this way would appear

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[13] Petitioners' suggestion (Pet. 23-24) that Congress approved the Board's construction of Section 10(h)(1) when it amended the statute in 1984 is without merit because the Board did not decide the issue until 1986. See *Dennis* v. *Detroit Harbor Terminals*, 18 Ben. Rev. Bd. Serv. (MB) 250 (Ben. Rev. Bd. 1986), aff'd, 850 F.2d 283 (6th Cir. 1988). The Board decisions cited by petitioner (Pet. 23 n.17) concern not post-1972 deaths but post-1972 disabilities.

[14] See p. 9 and note 9, *supra*.

to leave a gap in adjustments that Congress did not contemplate. Post-1972 death benefits, by contrast, are available under Section 9 regardless of the date of injury. See *Travelers Ins. Co.* v. *Marshall*, 634 F.2d 843, 845-849 (5th Cir. 1981) (agreeing with five other courts of appeals that 1972 death benefit provisions of Section 9 apply to post-amendment deaths following pre-amendment injuries).

Petitioners contend in the alternative that Section 10(h)(1) *must* be ambiguous because the *Detroit Harbor* majority found it to be. Pet. 13-17. Even if this provision of the Longshore Act were ambiguous, the courts would be obligated to defer to the Director's reasonable interpretation. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).[15] And in any event, the majority in *Detroit Harbor*—which strained to assert that a death in 1980 had "commenced" in a 1969 injury (see 850 F.2d at 288)—offers no support for petitioners' position that is not fully refuted by the reasoning of the First Circuit in this case.

3. Although the First and Sixth Circuits have disagreed on the interpretation of Section 10(h)(1), review by this Court is unnecessary because the Sixth Circuit's erroneous decision will affect few, if any, cases. It was estimated in 1972 that only about 2000

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[15] Petitioners' suggestion that this Court should defer to the Benefits Review Board, and thus not to the Director (Pet. 23), is contrary to this Court's admonition that the Board "is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). The Director administers the statute for the Secretary of Labor. See 33 U.S.C. 939 (1982 & Supp. V 1987); 20 C.F.R. 701.202(a).

persons (employees and survivors) would be eligible for the Section's adjustment (118 Cong. Rec. 36,386 (1972) (Rep. Steiger)). And of these, only about 1400 were, like Mr. Lebel, employees receiving total permanent disability benefits. See Pet. 11. According to data the Department of Labor submitted to Congress during consideration of the 1972 amendments, less than 2% of covered injuries occurred at sites within the Sixth Circuit's jurisdiction. See *Senate Hearings* 762-763.[16] Applying this percentage in the present context, it appears that some 20 to 30 cases at most could ever have been subject to the Sixth Circuit's views on Section 10(h)(1). The benefits due in such cases are, similarly, a minute fraction of the $300 million estimated cost cited by petitioners. Pet. 12.

Moreover, many of the cases that may have been subject to Section 10(h)(1) in 1972 are unlikely to raise the issue presented here in the Sixth Circuit in the future. Out of these cases, some individuals may die or have died without survivors. Others may die or have died of causes unrelated to the total permanent disability; the Board has thus far denied Section 10(h)(1) "adjustments" of death benefits

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[16] The Department provided estimates of its workload for the 15 district offices that existed in FY 1971. In that year, the Cleveland district included all Sixth Circuit states (Ohio, Michigan, Tennessee, and Kentucky) as well as Indiana, West Virginia, and Erie, Pennsylvania. See *Senate Hearings* 763, 764. The Cleveland office, excluding the port of Erie, received 1204, or 1.76% of the 68,464 Longshore injury reports for that year. *Id.* at 763. See also *id.* at 772 (injury reports for FY 1963-1970 for Cleveland office, including Erie, were 1.5-2.1% of the yearly totals).

to employers and insurers in this situation.[17] See *Witthuhn* v. *Todd Shipyards Corp.*, 3 Ben. Rev. Bd. Serv. (MB) 146, 148-149 (1976), aff'd, 596 F.2d 899 (9th Cir. 1979); *Rouse* v. *Norfolk, Baltimore & Carolina Lines, Inc.*, 2 Ben. Rev. Bd. Serv. (MB) 11, 16 (1975), aff'd, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977). Cf. *Travelers Ins. Co.* v. *Marshall*, 634 F.2d at 845-849 and cases cited.

Nor can the number of potentially affected cases be expanded, as petitioners suggest (Pet. 11), to include those involving occupational diseases with "typically * * * long latency periods." Congress provided in 1984 that the date of injury in such cases "shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." Pub. L. No. 98-426, § 10(a)(2), 98 Stat. 1647-1648 (codified at 33 U.S.C. 910(i) (Supp. V 1987)). Thus, workers exposed to asbestos and other harmful agents before 1972 are not deemed to be injured before 1972 for purposes of Section 10(h)(1) if the disease does not manifest itself or if the worker (or survivor in death cases) does not realize the disease's relationship to work exposure until after 1972. See, *e.g.*, *Taddeo* v. *Bethlehem Steel Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 52 (Ben. Rev. Bd. 1989); *Pitts* v. *Bethlehem Steel Corp.*, 17 Ben. Rev. Bd. Serv. (MB) 17 (Ben. Rev. Bd. 1985). Because claims must be filed within two years of awareness of the injury (33 U.S.C. 913(b)(2) (Supp. V 1987)), claimants can no longer

[17] No death benefits whatever are available for deaths due to unrelated causes in cases of death occuring before 1972 or after 1984. See note 1, *supra*.

successfully file occupational disease claims based on pre-1972 injuries.

In sum, since the Sixth Circuit's decision, standing alone, will have little or no practical effect on the Longshore benefits program, we do not believe that the differing views of the First and Sixth Circuits require this Court's intervention on this narrow question of interpretation of a complex statutory provision. There will be time enough for the Court to review any decision that has a more serious impact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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